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IN THE

Supreme Court of the United States

No. 73-629

October Term, 1973

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,
Petitioner,

v.

NATIONAL CASH REGISTER COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO

REPLY BRIEF FOR THE PETITIONER

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[1]See Madison, Debates in the Federal Convention of 1787, 538-541, 573-577, 622-623, 717-718 (Scott ed.; 1839).

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ARGUMENT

I. PERSONAL PROPERTY IS NOT IMMUNE FROM STATE TAXATION UNLESS IT HAS STARTED ON ITS JOURNEY TO A FOREIGN DESTINATION.

The Petitioner, Tax Commissioner of Ohio, again asserts that the exemption from state taxation provided for in the Import-Export Clause of the United States Constitution only attaches to goods which have in fact entered into the export stream. In the case at bar, NCR's goods have not begun movement toward their foreign destination. In other words, they have not entered the

stream of export. As the Supreme Court said in *Cornell v. Coyne*, 192 U.S. 418 (1904):

> "• • • The exemption attaches to the export and not to the article before its exportation. • • •" (192 U.S. 427.)

For this reason NCR's tests for export immunity are not valid and do not apply here. NCR argues that export immunity attaches at that point in time when the goods claimed immune are shown to be (1) segregated and set apart from the mass of general property within the state, and (2) when the certainty of exportation of the goods is demonstrated for all practical purposes. This contention, however, flies in the face of two previous decisions by this Court. In *Empresa Siderurgica v. County of Merced*, 337 U.S. 154 (1949), the Court clearly stated, relying upon *Coe v. Errol*, 116 U.S. 517, that goods do *not* cease to be part of the general mass of property in the state, subject as such to its jurisdiction and taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state or have been started upon such transportation in a continuous route or journey.

Additionally, the certainty of export of goods cannot be demonstrated for practical purposes until actual movement in the stream of export occurs. As noted by this Court in *Empresa, supra:*

> "• • • It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. *Nothing less will suffice.*" (337 U.S. 156, 157; emphasis added)

Furthermore, NCR has not met either of these tests, even assuming that the tests are proper ones to be applied in export cases. NCR's goods may be separated from other goods in the sense that they are in NCR's warehouse where

only a certain type of goods are located, but the warehouse and the goods are located in Ohio with the rest of the general mass of property subject to Ohio ad valorem personal property taxation. The goods are still enjoying the benefits conferred upon all goods in Ohio by the government of that state.

There is no certainty of export for NCR's goods. NCR places great reliance upon the fact that these machines have been manufactured pursuant to foreign specifications and thus they could not be sold here domestically. The Tax Commissioner believes that that is still not enough. For example, while these goods are awaiting shipment in the warehouse in Dayton, Ohio, NCR could make the determination that shipping these machines to a specific foreign country *would no longer produce a profit but rather would be economically unprofitable.* In that situation (along with many other situations such as the goods being destroyed by fire, acts of nature, etc.), NCR could very easily make the determination not to export the goods at all. Since the exemption from state taxation only attaches to the export and not at any earlier time or to other types of property, NCR would not be entitled to the export exemption for those particular goods. Under NCR's tests, however, the exemption would still apply. The Tax Commissioner does not believe that this is the result the Court has ever envisioned in any of its past decisions or would like to have occur at the present day.

NCR makes the statement that on the date of the Ohio tax levy, the certainty of exportation of the NCR warehoused machines was as firmly established and proven as it ever could be. The Tax Commissioner responds that the certainty of export was as firmly established and proved as it ever could be, *at least as firmly as could be established until actual movement did occur.* This clearly shows the reason for the test that movement must occur.

The real certainty is when movement actually occurs—not before.

II. THE CONSTITUTIONAL CONCERN THAT RESULTED IN THE IMPORT-EXPORT CLAUSE WAS TO PROTECT THE GOODS OF ONE STATE FROM TAXATION BY SISTER STATES.

The Tax Commissioner takes issue with NCR's claim that the constitutional concern was with protecting from taxation property which was to be exported from the United States to foreign countries. The constitutional intent was not to insure that a state's manufactured goods that were to be exported should be free to compete without a state's imposition of taxation in an international market. The intent, as stated by the Framers of the Constitution, was to insure that one state did not levy import or export taxes against the products of another state and thus discriminate among the states by taxation.[1] In other words, the constitutional intent was not concerned with the international market but rather with a domestic prohibition to the states against taxation.

Moreover, NCR has never shown any proof of the effect that state taxation has on its goods. NCR has never shown if the imposition of Ohio property tax increases the price of its goods or that state taxation has any negative effect on the sale of those goods. There are no facts in the Appendix to show that NCR's goods are less competitive in the international market by the imposition of the Ohio tax. This fact is important since this seems to be the value that underlines NCR's constitutional purpose argument.

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[1]See Madison, *Debates in the Federal Convention of 1787*, 538-541, 573-577, 622-623, 717-718 (Scott ed.; 1839).

III. NCR'S GOODS HAVE RECEIVED BENEFIT FROM THE STATE OF OHIO FOR WHICH OHIO CAN ASK FOR SOMETHING IN RETURN.

Ohio has a very strong interest in the export area. In 1971 Ohio ranked second among all the states in the United States in the value of its exports. Of equal importance is the fact that in 1971 Ohio led the entire nation in employment relating to exports.[2] Consequently Ohio, and states like Ohio, have the difficult problem of maintaining a balance between the necessity for protecting its tax base, the necessity of providing services for all tangible personal property in the state, and the necessity of employing its residents. Ohio, as well as other states who will be obliged to follow the decision of this Court in the instant case, appreciate that the reconciliation of the demands of constitutional immunity in the state's power to tax is an extremely practical matter. The approach that this Court has taken for close to one hundred years that requires actual physical movement before the export exemption attaches is not mechanistic, but is a practical, realistic approach that is easy for tax administrators to administer and also easy for taxpayers to understand. This has been the primary reason for the lack of litigation on this issue. Most manufacturers can understand and appreciate the current test. These reasons should not be given a low priority by this Court.

The test sought by NCR, however, is subjective and the acceptance of such a contention would "lead back to

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[2]U.S. Dept. Commerce, Social and Economic Statistics Administration, Bureau of the Census, Current Industrial Reports, Preliminary Report, Survey of the Origin of Exports of Manufacturing Establishments in 1971; Series MA-161 (71)-1; for release: September 11, 1973.

every forest, mine and factory in the land and create a zone of tax immunity never before imagined."[3]

If it were true that NCR's goods were already exports, then obviously they would not need and would not require any Ohio services. If they were exports, they would have begun some kind of movement either by NCR's own trucks or by interstate common carrier, by storage in the hold of a vessel, or any other means of transportation. Hence Ohio could not ask for anything from NCR. However, in this case it is obvious that the goods in question are not exports because they are still resting in Ohio and they are, in turn, receiving something from Ohio for which the state can ask return. For example, NCR's goods are receiving the protection of Ohio police and fire services. If these did not exist, it may well be true that NCR's goods would not themselves exist when that day came that they began the movement toward exportation and in fact became exports. The services of Ohio make it more certain that these machines will exist in marketable form on the day they become exports and that there will be state and county roads and highways and all those other things that are necessary for NCR to begin the actual movement from Ohio (and immunity from Ohio taxation). Until that point in time they are not exports.

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[3]*Shell Oil Co. v. State Board of Equalization*, 51 Cal. Rptr. 524 (1966).

CONCLUSION

For the reasons stated in the Brief for the Petitioner and herein, the judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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